

**BEFORE THE
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of :Accusation Against:

MARK D. DIAMOND, Ph.D.
29377 Rancho California Rd., #201
Temecula, CA 92591

Psychologist License No. PSY 8771

Respondent.

Case No. W-229

OAH No. L-2002050026

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by
the Board of Psychology as the Decision in the above-entitled matter.

This Decision shall become effective on August 7, 2003

IT IS SO ORDERED.

Date: July 8, 2003



WILLIAM LEW TAN, PRESIDENT
BOARD OF PSYCHOLOGY
DEPARTMENT OF CONSUMER AFFAIRS

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PROPOSED DECISION

Administrative Law Judge Vallera J. Johnson, State of California, Office of Administrative Hearings, heard this matter in San Diego, California on December 9, 10 and 11, 2002.

Mary Agnes Matyszewski, Deputy Attorney General, represented complainant.

A. Stephen Frankel, Ph.D., Esq., represented respondent who was present during the hearing.

The matter was submitted on January 8, 2003¹.

FACTUAL FINDINGS

1. Thomas O'Connor filed Accusation No. W229, dated April 15, 2002, against Mark D. Diamond, Ph.D. (respondent) in his official capacity as Executive Officer of the State of California, Department of Consumer Affairs, Board of Psychology, (Board).

Respondent filed a timely Notice of Defense.

¹ Complainant's Closing Argument was filed on December 20, 2002, marked Exhibit 18. On December 30, 2002, respondent filed his Closing Argument, and it was marked Exhibit I. Complainant's Rebuttal to Respondent's Closing Argument was filed on January 8, 2003; this document was marked Exhibit 19. On the same date, the record was closed, and the matter was submitted.

2. Complainant alleges that respondent is subject to discipline because he engaged in unprofessional conduct in his care, treatment and management of patient Joan Susan Aguirre (Aguirre), when he allowed his nine year-old son to sit in a therapy session with this patient in violation of Business and Professions Code sections 2960(h) and (j).

3. On February 4, 1985, the Board issued Psychologist's License No. PSY 877 to respondent. At all times relevant herein said license was in full force and effect and will expire on October 31, 2004, unless renewed.

No prior disciplinary action has been filed against respondent.

4. In support of the allegations against respondent, among other things, complainant offered the testimony of an expert witness, Gil Spielberg, Ph.D. (Dr. Spielberg), and the patient, Aguirre. In response, in addition to documentary evidence, respondent offered the testimony of his son (Matthew Diamond), three expert witnesses (Martin Williams, Ph.D. [Dr. Williams], Gerald C. Davison [Dr. Davison] and Stephen Berger, Ph.D. [Dr. Berger]), and himself.

5. In determining the facts that constitute the basis for the charges, the credibility of Aguirre, Matthew Diamond and respondent, the individuals involved in the incident, has been evaluated. A number of factors have been considered, including but not limited to, the bias of witnesses, consistency of testimony with other evidence, such as testimony and/or prior statement of a witness, conduct and demeanor of the witness. As it had been over two years between the psychotherapy session and the hearing, there was testimony that a witness did not recall a particular fact or his/her recollection was inaccurate, due in part to the fading of her/his memory.

Patient Aguirre contends that she was emotionally distraught at the time she called for her counseling appointment, while waiting in the reception area and during the session. Respondent disputes the foregoing. Regarding the salient facts, Matthew Diamond could not recall, confirm or dispute the facts at issue (Findings 6 and 7). Certainly there is some question about Aguirre's testimony that she was startled to see the little boy when she walked in the session after completing and executing the release a few minutes before. Nevertheless, it is clear that she has been emotionally distraught from the time that she discovered the materials in her son's room the evening before the session; she was upset during the session and cried during the hearing as she testified in this case, over two years later. Further, she terminated her session with respondent early, and, though she scheduled a second appointment with respondent at the conclusion of her session, she immediately canceled it. There is no evidence that she will gain financially or otherwise as a result of her statements or conduct. Further, respondent testified that, though his primary obligation is to his patient, "there are exceptions, protecting his skin is one of them". Given the foregoing, Aguirre's statements are more credible and trustworthy than respondent's.

6. On July 26, 2000, respondent provided care and treatment for patient Aguirre.

At 8:45 a.m., Aguirre called Temecula Psychological Service and requested an emergency/urgent appointment for treatment. The appointment was scheduled with respondent. Matthew Diamond, his son, was in the office at the time the appointment was scheduled.

Prior to making the call, Aguirre had been at work, crying at her desk for almost an hour. When she arrived at respondent's office, she continued to be very distressed and focused on the issues regarding her son.

7. Interested in his father's work as a psychologist, Matthew Diamond asked his father if he could sit in the session with Aguirre. While she was in the reception area, respondent walked out and asked her permission for the child to sit in the session. She agreed. He presented a form for her to complete and to execute. Aguirre wrote: "I agree to have Matthew Diamond age 9 to sit in on today's session" and signed it. According to Aguirre, irrespective of the fact that she completed the foregoing form, when she walked into the room, she was surprised to see the little boy there.

8. Patient Aguirre's presenting complaints included depression following the discovery of homosexual materials and suicide notes in her son's room. She reported to respondent that she had bipolar disorder and a history of substance abuse.

During the session, Aguirre asked respondent several times if it was appropriate for his nine-year old son to be hearing discussions about homosexuality and suicide. Respondent assured her it was fine. It appeared to Aguirre that the nine-year old was uncomfortable during the counseling session. At one point during the session, she told the nine year-old that she was sorry that he had to hear what she was saying about her son.

Because she was uncomfortable, Aguirre terminated the session with respondent early. Though she made a subsequent appointment with him, less than an hour later, Aguirre cancelled the appointment and did not re-schedule another appointment with him.

9. Complainant's expert witness contends that respondent allowing his nine year-old son in the session was a violation of the standard of care and ethical guidelines of the American Psychological Association (APA) because his presence impaired respondent's ability to properly manage and treat patient Aguirre and jeopardized her right to confidentiality.

Respondent argues that, given the facts of this case, he acted properly.

Matthew Diamond is an intelligent child. Prior to July 26, 2000, he had expressed an interest in his father's work, and they had had discussions about his work. Respondent's son had requested that he be allowed to sit in a session. According to respondent, he had given serious thought to his son's request and developed criteria for this to occur. Respondent wanted the patient to be a first time patient, so that the patient would be comfortable refusing and not feel compelled to agree because of an existing relationship the patient had with him; further, he wanted a "therapy-wise" patient, one who had received treatment previously so that the patient would understand the consent form and the rights being waived. When Aguirre arrived, he asked her if she would be willing to have his nine year-old son sit in the session. She agreed, and he provided her with the "Permission to Release Information", which she completed and executed. He instructed his son to sit quietly in the session and that he was to say nothing to anyone about what he might see or hear.

Respondent contends that there is no standard of care regarding a therapist allowing his nine year-old son sit in a session. Given the facts set forth in the foregoing paragraph, respondent asserts that he acted properly. As set forth in Finding 4, he offered the testimony of three expert witnesses in support of his argument. In addition, Aguirre provided sufficient information for him to perform a proper assessment.

Respondent argues that there are a number of analogous situations, i.e., a third person observes a session, that are acceptable within the profession, such as training during which a third person observes the session, a group counseling session or a peer mediation. In these instances, the patient waives confidentiality.

According to respondent's expert witnesses, he acted properly when he obtained the consent form; even if Aguirre was emotionally distraught, this did not impact her competency to consent or the validity of the document; and it complies with the standard of care because a psychologist cannot include each and every right that a patient waives in such a document; and, Aguirre knew that the child would be in the room, thereby waiving her right to confidentiality.

Doctors Williams, Davison and Belchar explained the potential benefit to the patient and acknowledged the potential problems (Finding 11) associated with having respondent's son in the session with Aguirre.

10. The qualifications and testimony of the expert witnesses have been evaluated. The factors of particular significance are:

- the questions about Dr. Spielberg's qualifications and certain statements in his report, particularly absolute statements; his statements regarding the Evidence Code are disregarded;

- Dr. Martin's responses were so biased as to render his testimony of minimal assistance; and
- Dr. Davison had not practiced for four or five years prior to hearing.
- some information, provided by respondent, or, assumptions not provided by respondent, that constituted the basis for the opinions of the expert witnesses were erroneous.

Most persuasive is the testimony that not one of the expert witnesses had heard of a therapist allowing his nine year-old child sit in the session, had learned or taught this or published regarding this issue; further, there is no evidence that respondent considered the benefit or detriment to the patient in doing so. Given the foregoing, no expert provided a reasonable explanation for the conclusion that the consent form executed by Aguirre was adequate.

11. The presence of respondent's nine year-old son had the potential to:

- compromise the session with Aguirre, by impacting her comfort, her reactions and her statements;
- effect respondent's assessment of Aguirre because the child's presence had the potential to affect her responses; and
- heighten Aguirre's emotional situation since she was there to discuss issues involving her son.

12. At no time did respondent discuss with Aguirre the potential impact of allowing his son to sit in the session. He did not explain that the rights that she waived as a result of his presence. Respondent jeopardized Aguirre's right to privacy and confidentiality since he could not be certain that his son would maintain the patient's confidential information or protect her privacy.

13. According to the evidence, Matthew Diamond was in the room to learn about psychotherapy. Expert testimony established that having respondent's son in the session was potentially beneficial to the patient. There is no evidence that respondent considered such benefit or that, in fact, there was a benefit to the patient in having respondent's nine year-old son in the session. According to the evidence, she was uncomfortable because respondent's son was in the room.

14. In his care, treatment and management of patient Aguirre, respondent's conduct constitutes an extreme departure from the standard of care, by reason of Findings 6, 7, 8, 11, 12 and 13.

15. At the time that she completed and executed the "Permission to Release Information", patient Aguirre was emotionally distraught; as a result, complainant contends that her consent was uninformed. There is no evidence that the consent was obtained by means of fraud, misrepresentation, coercion or duress. It is not

uncommon for patients who are receiving psychotherapy to be upset at the time the patient executes forms. Given the foregoing, insufficient evidence was offered to establish that respondent's consent was uninformed because she was emotionally distraught at the time that she completed and executed the "Permission to Release Information".

16. After patient Aguirre agreed to allow respondent's son to sit in her session, she completed and executed the "Permission to Release Information". She knew that Matthew Diamond would sit in the session and nothing more. Respondent did not inform her of the potential consequences and/or that his son had no duty to maintain the confidentiality of her information. Given the foregoing, her consent was uninformed.

17. In his care, treatment and management of Aguirre, respondent caused the unauthorized communication of information received in confidence in that, at the time that she completed and executed the form, respondent did not inform her of the potential consequences of his nine year-old son sitting in the session and/or that his son had no duty to maintain the confidentiality of her information, by reason of Findings 6, 7, 8, 12, 15 and 16.

18. Respondent has been licensed as a psychologist over 17 years. No evidence was offered to establish that his license has been previously disciplined by the Board or that he has engaged in misconduct that could or would result in license discipline.

Respondent enjoys an excellent reputation in his community as a psychologist, particularly as a psychologist concerned about his patient. The incident that resulted in the Accusation was the result of an exercise of bad judgment and appears to be aberrational. With the exception of the issue in this case, i.e., allowing a third person to sit in a session, there is no evidence that it occurred as a result of deficiency in education and/or training and/or that respondent's ability to function independently is in question. To the contrary, according to the evidence, respondent obtained sufficient information from Aguirre to perform a proper assessment and appropriate therapeutic intervention. Further, though it is clear that Aguirre was upset about respondent's son presence during the session and that there was potential for patient harm, there is no evidence that in fact she sustained harm or injury.

Nevertheless, there is concern that respondent understands his mistake or appreciates his obligation to his patients. He allowed his son to sit in the therapy session with Aguirre solely to educate him about psychotherapy, without consideration of impact on the session. Respondent testified that "his first responsibility is to his patient, virtually always. There are some exceptions, protecting my skin would be one of them." Further he explained that he would not have his son in the session again, not because of the potential harm or concern about the patient but because the anguish and stress that he experienced as a consequence of

this disciplinary action would inhibit his ability to focus on the patient in the session. There is no evidence that at any time he was concerned about the potential harm to Aguirre.

19. Pursuant to Business and Professions Code section 125.3, complainant seeks recovery of the costs of investigation and enforcement of the allegations set forth in the Accusation. In support of this request, complainant submitted "Cost Certification" executed by Deputy Attorney General Mary Agnes Matysezewski, and "Certification of Costs of Investigation and Enforcement Pursuant to Business and Professions Code section 125.3" executed by Felix Rodriguez, Supervising Investigator, seeking recovery of costs in the amount of \$10,059.56. It includes (1) Attorney General's costs for legal services of \$5,197.50 and (2) costs of investigation of \$4,862.06. The supporting documents include the tasks performed, the amount of time spent on these tasks and the hourly rate billed. Respondent made no objection.

LEGAL CONCLUSIONS

1. Complainant bears the burden of proving the charges by clear and convincing evidence to a reasonable certainty. *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853. This requires that he present evidence "of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth" of the charges (BAJI 2.62), and be "so clear as to leave no substantial doubt." *In re Angelia P.* (1981) 28 Cal.3d 908, 919; *In re David C.* (1984) 152 Cal.App.3d 1189, 1208. If the totality of the evidence serves only to raise concern, suspicion, conjecture or speculation, the standard is not met.

2. A psychologist's conduct can be the subject of discipline if he has engaged in acts that are defined as "unprofessional conduct". In the administrative discipline context, unprofessional conduct refers to acts or omissions that are grossly negligent or incompetent or repeatedly negligent.

Respondent had a duty to perform professional services for patients with the degree of learning and skill ordinarily possessed by a reputable psychologist practicing in the same or similar locality and under similar circumstances. He had a duty to use the care and skill ordinarily used in like cases by reputable members of his profession practicing in the same or similar locality under similar circumstances, and to use reasonable diligence and his best judgment in the exercise of his professional skill and the application of his learning, in an effort to accomplish the purpose for which he was consulted. A failure to fulfill any such duty is negligence. *Keen v. Prisinzano* (1972) 23 Cal.App.3d 275, 279, 100 Cal.Rptr. 82, 84; *Huffman v. Lundquist* (1951) 37Cal.2d 465, 473, 234 Pac.2d 34, 38; BAJI 7th Ed. No. 6.00, 6.37.

A lack of ordinary care defines negligent conduct. Gross negligence is an error or omission that is egregious and flagrant. "Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard

of conduct." *VanMeter v. Bent Construction Co.* (1946) 46 Cal.2d 588, 297 Pac.2d 644. Attempting to categorize degrees of negligence is difficult and oftentimes it is hard to distinguish an act that is very negligent from an act that is slightly grossly negligent. Nevertheless, a distinction has been recognized in the law between ordinary and gross negligence, and this distinction forms the basis upon which administrative jeopardy attaches to a respondent's conduct.

3. Cause exists to discipline respondent's license in that, in his care, treatment and management of patient Aguirre, his conduct constitutes unprofessional conduct in violation of Business and Professions Code section 2960 (j) by reason of Findings 6, 7, 8, 11, 12, 13 and 14.

4. Cause exists to discipline respondent's license in that in connection with his care, treatment and management of patient Aguirre he caused the unauthorized communication of information received in confidence, by reason of Findings 6, 7, 8, 12, 15, 16 and 17.

5. In determining the appropriate discipline, if any, consideration has been given to the legislative intent that the purpose of the statutory scheme to license and discipline psychologists is to protect the public interest rather than punish a wrongdoer. *Fahmy v. Medical Board of California* (1995) 38 Cal.App.4th 810, 45 Cal.Rptr.2d 486.

Considering the facts, the law and the violations committed by respondent (Findings 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, and Legal Conclusions 1, 2, 3 and 4), an order of discipline must be issued that rehabilitates respondent as long as his deficiencies are sufficiently corrected to protect the public interest. The Board's disciplinary guidelines have been considered.

Given the facts, the law, violations and the Board's disciplinary guidelines, it is in the public interest to allow respondent to practice psychology with a probationary license with the terms and conditions set forth below.

6. Complainant seeks to recover the Board's costs of investigation and enforcement of this case. Respondent established costs of investigation and enforcement in the amount of \$10,059.56. Respondent did not object. The reasonable costs of investigation and enforcement are \$10,059.56, by reason of Finding 19.

ORDER

License number 8771 issued to Mark D. Diamond, Ph.D. is revoked; provided however, the order of revocation is stayed, and respondent is placed on probation for a period of three (3) years on the following terms and conditions:

- A. Within ninety (90) days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval, the name and qualifications of a psychologist who has agreed to serve as a practice monitor. The monitor shall (1) be a California-licensed psychologist with a clear and current license; and (2) have no prior business, professional, personal or other relationship with respondent. The monitor's education and experience shall be in the same field of practice as that of respondent.

Once approved, the monitor shall submit to the Board or its designee a plan by which respondent's practice shall be monitored. The monitor shall review any session during which a third person, other than a family member of the patient, is present. The purpose of the review is to assure the appropriateness of the presence of the third person and that respondent has properly disclosed the potential consequences associated therewith. Unless it is contrary to the interest of the patient, review by the monitor shall occur prior to the session.

Monitoring shall occur during the first two (2) years of the probationary period.

Respondent shall provide the monitor with a copy of this Decision and access to the necessary patient records and shall obtain the necessary patient releases to enable the monitor to review records and to make direct contact with patients. Respondent shall execute a release authorizing the monitor to divulge any information that the Board may request. It shall be respondent's responsibility to assure that the monitor submits written reports to the Board or its designee on a quarterly basis verifying that monitoring has taken place and providing an evaluation of respondent's performance.

Respondent shall notify the patients of any term or condition of probation which will affect their therapy or the confidentiality of their records (such as this condition which requires a practice monitor). Such notifications shall be signed by each patient prior to continuing or commencing treatment.

- B. Within ninety (90) days of the effective date of this Decision, respondent shall submit to the Board or its designee for prior approval a course in laws and ethics related to the practice of psychology. Said course must be successfully completed at an accredited educational institution or through a provider approved by the Board's accreditation agency for continuing education credit. Said course must be taken and completed within one year from the effective date of this Decision. The cost associated with the law and ethics course shall be paid by respondent.
- C. Respondent shall pay the Board's costs of investigation and enforcement in the amount of \$10,059.56 within the first year of probation. Such costs shall be

payable to the Board. Failure to pay such costs shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve him of the obligation or responsibility to pay investigation and enforcement costs.

- D. Respondent shall pay the costs associated with probation monitoring each year of probation. Such costs shall be payable to the Board at the end of each fiscal year (July 1 – June 30). Failure to pay such costs shall be considered a violation of probation.

The filing of bankruptcy by respondent shall not relieve him of the responsibility or obligation to pay probation monitoring costs.

- E. Respondent shall obey all federal, state, and local laws and all regulations governing the practice of psychology in California including the ethical guidelines of the American Psychological Association. A full and detailed account of any and all violations of law shall be reported by respondent to the Board or its designee in writing within seventy-two (72) hours of occurrence.

- F. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board or its designee, stating whether there has been compliance with all conditions of probation.

- G. Respondent shall comply with the Board's probation program, and, upon reasonable notice, shall report to the assigned District Office of the Medical Board of California or other designated probation monitor. Respondent shall contact the assigned probation officer regarding any questions specific to the probation order. Respondent shall not have any unsolicited or unapproved contact with (1) complainants associated with the case; (2) Board members or members of its staff; or (3) persons serving the Board as expert evaluators.

- H. Respondent shall appear in person for interviews with the Board or its designee upon request at various intervals and with reasonable notice.

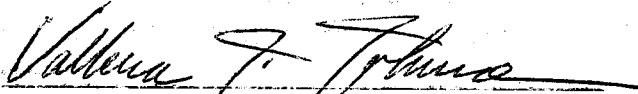
- I. Respondent shall notify the Board in writing, through the assigned probation officer, of any and all changes of employment, location, and address within thirty (30) days of such change.

- J. In the event respondent should leave California to reside or to practice outside the State or should respondent stop practicing psychology in California, he shall notify the Board or its designee in writing within ten (10) days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty (30) days in which respondent is not engaging in any activities defined in Sections 2902

and 2903 of the Business and Professions Code. Periods of temporary or permanent residency or practice outside California or of non-practice within California will not apply to the reduction of this probationary period, although the Board may allow respondent to complete certain terms of probation that are not associated with active practice.

- K. Respondent shall not employ or supervise or apply to employ or supervise psychological assistants, interns or trainees during the course of this probation. Any such relationship in existence on the effective date of the Decision shall be terminated by respondent and/or the Board.
- L. If respondent violates probation in any respect, after giving him notice and an opportunity to be heard, the Board may revoke probation and carry out the disciplinary order that was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final. No Petition for Modification or Termination of Probation shall be considered while there is an Accusation or Petition to Revoke Probation pending against respondent.
- M. Upon successful completion of probation, respondent's license shall be fully restored.

Dated: June 9, 2003


VALLERA J. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

DECLARATION OF SERVICE BY CERTIFIED MAIL

In the Matter of the Accusation Filed
Against:

Mark D. Diamond, Ph.D.

No. : W229

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 1422 Howe Avenue, Ste. 22 Sacramento, California 95825. I served a true copy of the attached:

DECISION AND ORDER

by mail on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

NAME AND ADDRESS

CERT NO.

Mark D. Diamond, Ph.D.
29377 Rancho California Road, Suite 201
Temecula, CA 92591

7002 0860 0004 1219 5050

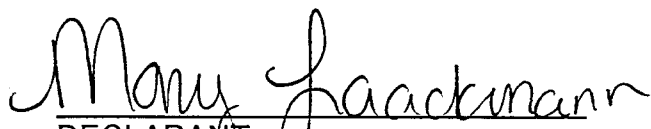
A. Stephen Frankel, Ph.D., Esq.
1867 Ygnacio Valley Road, #409
Walnut Creek, CA 94598

Mary Agnes Matyszewski
Deputy Attorney General
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P. O. Box 85266
San Diego, CA 92186-5266

Vallera J. Johnson, Administrative Law Judge
Office of Administrative Hearings
1350 Front Street, Suite 6022
San Diego, CA 92101

Each said envelope was then on, July 8, 2003, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, as certified mail, with the postage thereon fully prepaid, and return receipt requested.

Executed on, July 8, 2003, at Sacramento, California.
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


DECLARANT
Mary Laackmann
Enforcement Analyst